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STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. DA 09-0322

PLAINS GRAINS LIMITED PARTNERSHIP, a Montana limited partnership; PLAINS GRAINS INC., a Montana corporation; ROBERT E. LASSILA and EARLYNE A. LASSILA; KEVIN D. LASSILA and STEFFANI J. LASSILA; KERRY ANN (LASSILA) FRASER; DARYL E. LASSILA and LINDA K. LASSILA; DOROTHY LASSILA; DAN LASSILA; NANCY LASSILA BIRTWISTLE; CHRISTOPHER LASSILA; JOSEPH W. KANTOLA and MYRNA R. KANTOLA; KENT HOLTZ; HOTLZ FARMS, INC., a Montana corporation; MEADOWLARK FARMS, a Montana partnership; JON C. KANTOROWICZ and CHARLOTTE KANTOROWICZ; JAMES FELDMAN and COURTNEY FELDMAN; DAVID P. ROEHM and CLAIRE M. ROEHM; DENNIS N. WARD and LaLONNIE WARD; JANNY KINION-MAY; C LAZY J RANCH; CHARLES BUMGARNER and KARLA BUMGARNER; CARL W. MEHMKE and MARTHA MEHMKE; WALTER MEHMKE and ROBIN MEHMKE; LOUISIANA LAND & LIVESTOCK, LLC., a limited liability corporation; GWIN FAMILY TRUST, U/A DATED SEPTEMBER 20, 1991; FORDER LAND & CATTLE CO.; WAYNE W. FORDER and DOROTHY FORDER; CONN FORDER and JEANINE FORDER; ROBERT E. VIHINEN and PENNIE VIHINEN; VIOLET VIHINEN; ROBERT E. VIHINEN, TRUSTEE OF ELMER VIHINEN TRUST; JAYBE D. FLOYD and MICHAEL E. LUCKETT, TRUSTEES OF THE JAYBE D. FLOYD LIVING TRUST; ROBERT M. COLEMAN and HELEN

A. COLEMAN; GARY OWEN and KAY OWEN; RICHARD W. DOHRMAN and ADELE B. DOHRMAN; CHARLES CHRISTENSEN and YULIYA CHRISTENSEN; WALKER S. SMITH, JR. and TAMMIE LYNNE SMITH; MICHAEL E. HOY; JEROME R. THILL; and MONTANA ENVIRONMENTAL INFORMATION CENTER, a Montana nonprofit public benefit corporation,

Plaintiffs and Appellants,

vs.

BOARD OF COUNTY COMMISSIONERS OF CASCADE COUNTY, the governing body of the County of Cascade, acting by and through Peggy S. Beltrone, Lance Olson and Joe Briggs,

Defendants and Appellees,

SOUTHERN MONTANA ELECTRIC GENERATION and TRANSMISSION COOPERATIVE, INC.; the ESTATE OF DUANE L. URQUHART; MARY URQUHART; SCOTT URQUHART; and LINDA URQUHART,

Defendants/Intervenors and Appellees/Cross-Appellants.

REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS SOUTHERN MONTANA ELECTRIC AND THE URQUHARTS

On appeal from the Montana Eighth Judicial District Court
Cause No. BDV-08-480
Honorable E. Wayne Phillips Presiding

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I. SUMMARY OF ARGUMENT

This appeal is moot, and should therefore be dismissed, because Appellants (collectively, "Plains Grains")[1] failed to request a stay or an injunction of the decision to rezone, and following the rezoning Southern Montana (Appellee/Cross-Appellant) purchased the rezoned property from the Urquharts (Appellees/Cross-Appellants) and commenced construction on the site. The appeal is thus fatally flawed and should be summarily dismissed on grounds of mootness.

Earlier this year, in the April 28, 2009 decision of this Court granting, to a limited degree, the Writ of Supervisory Control requested by Plains Grains, this Court alerted Plains Grains of the need to request a stay or an injunction in order to preserve the arguments raised in this appeal. Plains Grains, however, chose not to follow the Court's directive and thus it cannot be heard to complain at this late date. It is worth emphasizing that Plains Grains acted at its own in peril, by failing to take the proper legal action to challenge Southern Montana's right to move forward with the intended development of the rezoned property, and consequently Plains Grains loses

[1] Plains Grains identifies itself as including "farmers and ranchers" in the area of the rezoned property. (*See, e.g.*, Plains Grains Br., p.2). However, Plains Grains also includes large corporate farms and the Montana Environmental Information Center ("MEIC"), which is a "Montana nonprofit public benefit corporation dedicated to the preservation and enhancement of the natural resources and natural environment of the State of Montana . . ." (Compl. ¶14). In fact, most of the Affidavits submitted by Plains Grains in this litigation were from Ann Hedges, the "Program Director" of MEIC. (Second Aff. of Ann Hedges ¶4).

on the threshold issue of mootness.

If the appeal is not dismissed on grounds of mootness, the decision of the Cascade County Commissioners (Appellees) to rezone should be upheld. The district court, however, erred in its analysis of the spot zoning issue by concluding that the rezoning was special legislation. The electrical generating facility planned for the rezoned property, known as the Highwood Generating Station ("HGS"), will benefit more than 50,000 Montanans, including the residents of the City of Great Falls and the surrounding area,[2] by providing electrical power, which is a basic necessity of these and indeed all Montanans.

II. ARGUMENT

A. THE APPEAL IS MOOT AND SHOULD THEREFORE BE DISMISSED.

1. The Appeal Is Moot Because Plains Grains Chose To Disregard The Admonition Of This Court To Request A Stay Or An Injunction During The Pendency Of This Appeal.

This case was previously before this Court on Plains Grains' request for a Writ of Supervisory Control. (*Plains Grains Ltd. Partn. v. Mont. Eighth Jud. Dist. Ct.*, Cause No. OP 09-0054). In the April 28, 2009 Order which issued in that proceeding, the Court specifically instructed Plains

[2] Southern Montana supplies power to the City of Great Falls, which is a member of Southern Montana.

Grains to request either a stay or an injunction during the pendency of any subsequent appeal. In addition, the Court also provided Plains Grains with a detailed explanation of the required filings and process, including citation to the relevant provisions of the Montana Rules of Appellate Procedure:

> The District Court should resolve any remaining claims in Plains Grains' complaint and issue a final judgment. At that point, Plains Grains can decide whether to appeal and whether to seek a stay of the District court's final judgment or an injunction pending appeal. Plains Grains must first file with the District Court any request for a stay or an injunction pending appeal. M.R.App.P. 22(1)(a)(i) and (iii). A district court retains jurisdiction to rule on any motion for stay even after the appellant has filed a notice of appeal. M.R.App.P.22(1)(c). The district court promptly must enter a written order on a motion filed, M.R.App.P.22, and include findings of fact and conclusions of law, or a supporting rationale, that contains the relevant facts and legal authority on which the district court based its order. M.R.App.P. 22(1)(d). This Court retains the authority to review any decision by the district court regarding the stay of execution of a judgment or the denial or granting of an injunction pending appeal. M.R.App.P.22(2).

(April 28, 2009 Order, p.5) **(Tab 6)**.

The quoted text from this Court's Order shows that Plains Grains was gratuitously informed, in a manner which was direct, concise and clear, that in the event it decided to appeal the final judgment of the district court, which it did in fact do, that it would also need to request either a stay of the final judgment or a preliminary injunction. ***Plains Grains, however, chose not to follow the Court's explicit direction on how to proceed on appeal,*** and consequently now finds itself having to defend its reasoning for not

doing so.

In these circumstances, the principle followed by this Court in the ***Turner*** case governs:

> A party may not claim an exception to the mootness doctrine where the case has become moot through the parties' own failure to seek a stay of the judgment.

Turner v. Mt. Engr. and Constr., Inc., 276 Mont. 55, 60, 915 P.2d 799, 803 (1996). As discussed below, none of the reasons advanced by Plains Grains for failing to follow the Court's previous mandate excuse its failure to follow this Court's well-established legal precedent.

2. The Appeal Is Moot Because This Court Can Not Return The Parties, And Southern Montana In Particular, To The Status Quo.

This Court has consistently ruled, in zoning and subdivision litigation, that the case becomes moot when the ***parties*** cannot be returned to the status quo:

- "During this litigation, including the appeal, Henesh faced a danger of dismissal for mootness if the property left the hands of the Estate, and thus there was a special need for a stay. The ***parties*** cannot now be returned to the ***status quo*** because of the transfer of the lots in the subdivision to a third party." ***Henesh v. Bd. of Commrs. of Gallatin County***, 2007 MT 335, ¶6, 340 Mont. 239, 173 P.3d 1188 (subdivision case) (emphasis added).

- "If this Court cannot restore the ***parties*** to their original positions, the appeal becomes moot. Thus, having abdicated the two remedies which would have preserved the ***status quo*** pending this Court's final resolution of the merits of his claim on appeal, we are no longer able

to grant Povsha effective relief." ***Povsha v. City of Billings***, 2007 MT 353, ¶23, 340 Mont. 346, 174 P.3d 515 (zone change and subdivision approval) (emphasis added).

- ". . . after her application for supervisory control was denied, Pegasus conveyed the re-aggregated parcel to a third party. Under these circumstances, it is impossible for this Court to grant effective relief or return the ***parties*** to the ***status quo***." ***Mills v. Alta Vista Ranch, LLC***, 2008 MT 214, ¶22, 344 Mont. 312, 187 P.3d 627 (subdivision case) (emphasis added).

Plains Grains errs by analyzing the mootness issue, and in particular the issue of whether the Court can return to the parties to the status quo, solely in terms of their request to overturn the zoning decision. (Plains Grains Response Br. ("P.G.Res.Br."), pp.3-6.). It is a given that, in any land use decision, the Court can reverse or undo the challenged decision and thereby restore the status quo to that limited degree. The crux of the issue is whether ***all the parties*** can be returned to their former positions.

In the cases cited above, had the Court overturned the challenged land use decision, it would not have been possible to return ***all of the parties*** to the status quo. This reasoning dictated the Court's conclusion that the appeal was moot.

Likewise, in this case, following the rezoning, the property was transferred from the Urquharts to Southern Montana, which then proceeded to expend substantial sums (millions of dollars) developing the property. If the rezoning at issue in this litigation were overturned, and the property

reclassified as agricultural as Plains Grains desires, neither the Urquharts nor Southern Montana could be returned to their prior positions, considering the subsequent sale and development of the property. Southern Montana, in particular, has changed positions, having spent millions of dollars in commencing construction, while Plains Grains sat on its hands, never moving for a stay or an injunction.

3. Plains Grains' Allegations On The Issue Of Mootness Are Irrelevant And Fall Outside The Record On Appeal.

Plains Grains advances as facts allegations which are totally irrelevant to the threshold issue of mootness. Other allegations are incorrect or outside the record of this appeal because they post-date the November 28, 2009 Order appealed. (P.G.Res.Br., pp.6-11; *see e.g.,* Ex. R (dated August 3, 2009); Ex. S (dated August 20, 2009); Ex. T (dated April 24, 2009)). This veiled attempt to divert the Court's attention from the relevant facts, not to mention facts clearly outside the record of this appeal, is wholly improper.

The irrelevant and otherwise improper allegations made by Plains Grains concern other proceedings falling outside this Court's jurisdiction, for example, the ongoing state air quality permit process and the federal Section 106 process for the federally designated landmark; the current status of construction on site at various times; the type of facility (coal versus

natural gas) Southern Montana proposes to build on the rezoned property; financing for the project; and other litigation involving the members of Southern Montana and in particular the Yellowstone Valley Electric Cooperative, Inc.

None of these allegations have any bearing on the issue of mootness. Nor do they in any way respond to the relevant facts, which are simply that Plains Grains sat on its rights and in the meantime Southern Montana purchased the rezoned property from the Urquharts and commenced construction of an electrical generating facility on the rezoned property.

Unlike the allegations argued by Plains Grains, the relevant and determinative facts relied on by Southern Montana are either in the record or not disputed by Plains Grains. Copies of the recorded deeds were attached to the Motion to Dismiss on Grounds of Mootness filed in this appeal, and can also be found in the District Court Record at Docket No. 24. In addition, Plains Grains does not dispute that Southern Montana commenced construction on site during the pendency of this appeal. (P.G.Res.Br., p.8-9).

Specific mention of the federal Section 106 process is warranted because Amici request leave to provide additional comment on issues which concern the Section 106 process. Amici, however, admit in their Motion

that the Section 106 consultation is a federal process. (Motion of Natl. Trust for Historic Preservation and Mont. Preservation Alliance for Leave to File Amicus Curiae Brief, p.2-3 (*"Interest of Amici Curiae,"* ¶¶3,5)). In addition, the Section 106 process is nearing an end.

4. The Sale Of The Property From The Urquharts To Southern Montana Renders The Appeal Moot.

A recurring theme in Plains Grains' brief is the argument that the sale from the Urquharts to Southern Montana was not a sale to a "third party" and that the mootness argument therefore fails. Plains Grains argues that the Urquharts and Southern Montana are one and the same because they jointly participated in pursuing approval of the rezoning of the property. (P.G.Res.Br., pp.6-8).

The ***Turner*** case, ***supra***, illustrates that the sale between the Urquharts and Southern Montana was a bona fide sale which renders the appeal moot. In that case, Turner, the mortgagee, bought the disputed property at a court-ordered foreclosure sale. ***Turner***, 276 Mont. at 58, 915 P.2d at 701. The sale occurred after the opposing parties, the lienholders, filed their appeal to this Court. As noted by the Court in its discussion of the background of the litigation, the lienholders did not stay the proceedings or post a supersedeas bond. ***Id.***

In light of the court-ordered foreclosure sale, Turner filed a motion to

dismiss the appeal as moot. ***Id.***, 276 Mont. at 59, 915 P.2d at 802. The Court agreed with Turner that the appeal was moot because "Appellants allowed [the] foreclosure sale to proceed, did not stay the proceedings, and did not post a supersedeas bond." ***Id.***, 276 Mont. at 63, 915 P.2d at 804. Notably, the Court applied the mootness doctrine even though Turner, the mortgagee and the complaining party in the litigation, bought the property: "Here, the subject property has been sold at a sheriff's sale and third party interests, albeit Turner's, are involved." ***Id.***

In this case, Southern Montana and the Urquharts entered into an option for purchase of the real property. This agreement, however, did not obligate Southern to buy the property and the Urquharts and Southern were at all times separate and autonomous parties, as sellers and purchaser of the property, respectively. This much was impliedly recognized by the district court, which granted summary judgment to the Urquharts on grounds of mootness but denied Southern Montana the same relief.

In a recent decision, ***Marr v. Fairview Commercial Lending, Inc.***, Cause No. DA 09-0323 (slip op. dated Sept. 23, 2009) **(Tab 7)**, the Court dismissed the appeal where the defaulting party, Marr, failed to take any action to stop the sale of her foreclosed property, following the appeal to this Court. The property was purchased by Fairview Lending, the beneficiary

under the Trust Indenture, which then sold it to its holding company, Fairview Holdings, Inc. The Court specifically found that Marr "did not move the District Court for a stay of judgment pending appeal and, consequently, Fairview has sold the property." The Court declined to entertain the issue of whether the sale from Fairview to Fairview Holdings was fraudulent because this was not presented to the district court. (Order at 2).

In this case, the property was transferred in an arms-length transaction, for bona fide value, from the Urquharts to Southern Montana, and the deeds were properly recorded with the Cascade County Clerk and Recorder in August of 2008. Plains Grains admits in its brief (P.G.Res.Br., p.7) it was on notice, by virtue of the rezoning, of the option to purchase entered into by the Urquharts and Southern Montana. Plains Grains thus had ample time, from the date of the filing of the notice of appeal, in April of 2008, until the time of the property transfer, in August of 2008, to take legal action to stop the sale of property. Contrary to Plains Grains' arguments, nothing in the dealings between the Urquharts and Southern Montana stood in the way of their exercising their legal right to stay the rezoning decision.

The Urquharts and Southern Montana were entitled under the law to go forward in the absence of any stay or injunction. The Urquharts and

Southern Montana also enjoy the right of every citizen to exercise their rights to not be damaged without remedy and to not be prevented from acting, during the course of litigation, without security for damages.

In addition, as discussed above, this Court, in its April 28, 2009 Order, alerted Plains Grains of the need to act. However, Plains Grains did not so act, to its own prejudice.

5. Caselaw Supports The Conclusion The Appeal Is Moot.

Plains Grains fails in its attempt to distinguish the cases cited by Southern Montana on the mootness issue. (P.G.Res.Br., p.11-17). Within the last few years, the Supreme Court has rendered several decisions in zoning and subdivision cases which are consistent and controlling. These cases hold that opponents of a rezoning or subdivision application, who do not request a stay of the decision, risk having their suit dismissed when the property is sold.

- ***Henesh v. Bd. of Commrs. of Gallatin County***, 2007 MT 335, 340 Mont. 239, 173 P.3d 1188 (A subdivision challenge in Gallatin County appealing the decision of the Board of Gallatin County Commissioners to the district court was held to be moot when the opponent did not ask the district court to enter a stay and the property was sold.).

- ***Povsha v. City of Billings***, 2007 MT 353, 340 Mont. 346, 174 P.3d 515 (Appeal to the Supreme Court was dismissed as moot as a result of the failure to obtain a stay and the building permit was subsequently issued and development commenced.).

- ***Mills v. Alta Vista Ranch, LLC***, 2008 MT 214, 344 Mont. 312, 187 P.3d 627 (Supreme Court again warned litigants that failure to seek a stay is fatal to a district court action seeking a writ of mandamus or judicial review when the property at issue has changed hands.).

- ***City of Whitefish v. Bd. of County Commrs. of Flathead County***, 2008 MT 436, ¶23, 347 Mont. 490, 199 P.3d 201 ("Notably, we chided the applicants in both *Povsha* and *Henesh* for failing to appeal the district court's denial of the request for injunctive relief or for failing to seek a stay of proceedings until the parties could reach a resolution on the merits. We explained that we could not restore the parties to their original positions once the challenged conduct had occurred.").

6. The Rezoning Is Meaningless If Southern Montana Can Not Act On It.

Reading between the lines, the thrust of Plains Grains' constitutional argument is that the district court's comment on the possibility of an "astronomical" bond prevented them from applying for a stay or an injunction. (P.G.Res.Br.. pp.18-24). As a practical matter, if this rationale were adopted by this Court it would force Southern Montana, and every other developer in this State, to adopt a wait and see policy following a rezoning decision and subsequent appeal. In Plains Grains' view, the fact of an appeal alone should be sufficient to halt development of a property following a legislative decision by the local governing body (which is entitled to the presumptions of validity and reasonableness, ***Schanz v. City of Billings***, 182 Mont. 328, 335, 597 P.2d 67, 71 (1979)), pending the

outcome on appeal. Quite simply, to borrow a term used by Plains Grains, this argument is "absurd." (*See, e.g.,* P.G.Res.Br., p.15)

Plains Grains' arguments can be answered very simply: It is axiomatic that the fact of a bond in no way prevented Plains Grains from exercising their fundamental right to access the legal system. In this case, following the rezoning, Southern Montana had every right to purchase the property and proceed with the development. As instructed by this Court, in its April 28, 2009 Order, if Plains Grains desired to go forward with the appeal, they were required to apply for a stay or an injunction.

Notably, this Court, in its April 28, 2009 Order, did not adopt the "astronomical" language of the district court. Rather, it set forth, in great detail, the applicable legal framework which Plains Grains was obligated to follow. It also instructed the district court that its order "must" include "findings of fact and conclusions of law, or a supporting rationale, that contains the relevant facts and legal authority on which the district court based its order." (Order at 5) **(Tab 6)**.

Plains Grains' argument, that the district court "reconciled" a possible conflict between statutory law and constitutional provisions, makes no sense. Rather, the record shows that what the district court did do was to make a ruling, *sua sponte*, on an issue which was neither raised nor briefed by the

parties, and Plains Grains in particular.

Plains Grains never raised the issues argued for the first time in this appeal because it never requested a stay or an injunction. Accordingly, the requirement and amount of a bond, not to mention whether and on what grounds such a bond would interfere with Plains Grains' rights, were not presented by Plains Grains for consideration by the district court. Therefore, neither these issues, nor the corresponding legal theories argued by Plains Grains, are properly before this Court. ***Vader v. Fleetwood Enters., Inc.***, 2009 MT 6, ¶37, 348 Mont. 344, 201 P.3d 139 ("We generally do not address issues raised for the first time on appeal, or a party's change in legal theory on appeal." ***Whitehorn v. Whitehorn Farms, Inc.***, 2008 MT 361, ¶21, 346 Mont. 394, 195 P.3d 836).

Contrary to Plains Grains' arguments, the Constitution does not guarantee Plains Grains their day in court without posting a bond for damages, thereby forcing Southern Montana to suffer damages by virtue of Plains Grains' multiple appeals. This Court's ruling in the ***Swan Lakers*** case speaks to this point.

> Milhouse is correct that a court has a duty to balance the equities and minimize potential damage when granting injunctive relief. Swan Lakers want to maintain the status quo while challenging the subdivision approval, but admit they do not have the resources to post a substantial bond. Milhous, on the other hand, has invested significant sums of money in its

> project and is undoubtedly suffering substantial losses with every passing day while the injunction remains in effect...Under these circumstances, we are compelled to conclude that it no longer remains equitable to allow the injunction to continue without Swan Lakers being required to post a bond or other security for the payment of costs and damages...

Swan Lakers v. Bd. of County Commrs. of Lake County (Mont. Sup. Ct. Cause No. DA 07-0619) (Tab 2, Order pp. 2-3).

In addition, as discussed in Southern Montana and the Urquharts' Notice of Untimely Constitutional Challenge, filed September 14, 2009, Plains Grains' Notice Involving Constitutional Questions is untimely. The Notice is untimely under Rule 27, M.R.App.P., because it was filed well beyond eleven days from the date of the Notice of Appeal (dated May 29, 2009 and filed June 1, 2009) and well beyond eleven days from the date of the Notice of Cross Appeal (dated June 10, 2009 and filed June 11, 2009).

This Court has held that the failure to timely serve notice of a constitutional issue precludes this Court from reaching the constitutional challenge. ***Haider v. Frances Mahon Deaconess Hosp.***, 2000 MT 32, 298 Mont. 203, 994 P.2d 1121; *see also* ***Boettcher v. Mont. Guar. Fund***, 2006 MT 127, 332 Mont. 279, 140 P.3d 474.

Finally, the discussion of "SLAPP" suits and citation to other federal authority is off base and irrelevant to the issues in this appeal.

B. THE REZONING DOES NOT RISE TO THE LEVEL OF SPECIAL LEGISLATION.

The rezoning was not special legislation designed to benefit one or a few landowners. The electrical generating plant (HGS) will be owned by four Montana rural electric utilities, which are member owned. As such, HGS will benefit 50,000 or more Montanans, who are customers of Southern Montana.

HGS will also benefit residents of the City of Great Falls and Cascade County by virtue of the City being a member of, and purchasing its power from, Southern Montana. In particular, HGS will provide power for City services, in addition to certain industrial and other business customers in the area.

Moreover, the HGS power plant will serve a basic need, i.e. electric power. This important fact, i.e. rezoning in order to accommodate a basic need of the public, distinguishes this case from other cases where the Court has addressed spot zoning. *See , e.g.,* ***Little v. Bd. of County Commrs. of Flathead County***, 193 Mont. 334, 631 P.2d 1282 (1981) (development of shopping mall); ***Citizen Advocates for a Livable Missoula, Inc. v. City Council of Missoula***, 2006 MT 47, 331 Mont. 269, 130 P.3d 1259 (development of a large Safeway supermarket); ***North 93 Neighbors, Inc. v. Bd. of County Commrs. of Flathead County***, 2006 MT 132, 332 Mont. 327,

137 P.3d 557 (development of a large suburban shopping mall).

In ***Boland v. City of Great Falls***, 275 Mont. 128, 910 P.2d 890 (1996), this Court found that development of condominiums was not special legislation for purposes of the spot zoning test.

> However, we disagree with plaintiffs' contention that only the condominium developer will benefit as a landowner from the zoning change.

Boland, 275 Mont. at 134-35, 910 P.2d at 894.

In the Court's most recent analysis of spot zoning, in the ***Lake County First*** case, the Court did not find spot zoning, or special legislation , where the development of a Wal-Mart superstore was proposed.

> Similar to our conclusion in *Citizen Advocates*, while the zoning proposal certainly benefits Wal-Mart, we cannot conclude that the benefit is inappropriately conferred at the expense of the general public and constitutes illegal spot zoning.

Lake County First v. Polson City Council, 2009 MT 322, ¶52, 2009 WL 3176604 (Mont. Sup. Ct. Cause No. DA 07-0659 Sep. 29, 2009).

Simply stated, if a Wal-Mart super store passes the special legislation test, an electrical generating facility, which provides a basic necessity, clearly passes as well and is not spot zoning.

III. CONCLUSION

Southern Montana and the Urquharts respectfully request the Court to

dismiss the appeal on grounds of mootness. Alternatively, Southern Montana and the Urquharts request the Court to uphold the Cascade County Commissioners' decision to rezone.

DATED this 7th day of October, 2009.

UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.

By: _____

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is printed with a proportionately spaced Times New Roman test typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is not more than 5,000 words, excluding certificate of service and certificate of compliance.

DATED this 7th day of October, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was duly served upon the respective attorneys for each of the parties entitled to service by depositing a copy in the United States mails at Great Falls, Montana, enclosed in a sealed envelope with first class postage prepaid thereon and addressed as follows:

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